

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WATER’S EDGE, A
CONDOMINIUM OWNERS
ASSOCIATION,

Plaintiff,

v.

AFFILIATED FM INSURANCE
COMPANY, et al.,

Defendants.

CASE NO. C19-1553JLR

ORDER ON *IN CAMERA*
REVIEW

On December 21, 2020, the court ordered Plaintiff Water’s Edge, a Condominium Owners Association (“the Association”) and Defendant Affiliated FM Insurance Company (“AFM”) to simultaneously submit letter briefs regarding various discovery issues. (*See* 12/21/20 Dkt. Entry; Pl. Statement (Dkt. # 52); Def. Statement (Dkt. # 54).) The court further ordered AFM to submit the documents at issue for an *in camera* review.

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1 (12/21/20 Dkt. Entry.) On January 29, 2021, the court held a telephonic motion hearing
2 and resolved two of the three discovery issues. (*See* 1/29/21 Min. Entry (Dkt. # 56).)

3 The court now addresses the remaining issue of which, if any, of AFM's withheld
4 or redacted documents should be produced pursuant to *Cedell v. Farmers Ins. Co.*, 295
5 P.3d 239 (Wash. 2013). (*See id.*) The court has reviewed the 173 documents at issue.
6 Based on the court's *in camera* review, the parties' submissions, and the parties'
7 representations during the telephonic motion hearing, the court GRANTS in part and
8 DENIES in part the Association's motion to compel.

9 As the court has articulated in past discovery disputes (*see* 10/27/20 Min. Entry
10 (Dkt. # 48); 11/10/20 Order (Dkt. # 49)), *Cedell* creates a presumption that "there is no
11 attorney-client privilege relevant between the insured and the insurer in the claims
12 adjusting process," 295 P.3d at 246. However, the insurer may overcome this
13 presumption by showing that its attorney was "not engaged in the quasi-fiduciary tasks of
14 investigating and evaluating or processing the claim, but instead in providing the insurer
15 with counsel as to its own potential liability." *Id.* The insured is thus entitled to
16 discovery of documents involving attorney work on quasi-fiduciary tasks. *See Linder v.*
17 *Great N. Ins. Co.*, No. C15-5002RBL, 2016 WL 740261, at *3 (W.D. Wash. Feb. 25,
18 2016) (ordering production of legal invoices involving attorneys' performance of
19 quasi-fiduciary tasks).

20 But even if the insurer successfully overcomes the initial presumption, the insured
21 may still pierce the attorney-client privilege through the "fraud" exception. *Cedell*, 295
22 P.3d at 246-47. The insured must assert that the insurer has engaged in "an act of bad

1 faith tantamount to civil fraud” and make “a showing that a reasonable person would
2 have a reasonable belief that an act of bad faith has occurred.” *Id.* Upon triggering the
3 “fraud” exception, the court conducts an *in camera* review to determine whether there is
4 “a foundation to permit a claim of bad faith . . . to proceed.” *Id.* at 247. To strip a
5 communication of its attorney-client privilege, the insured must show that “(1) [the
6 insurer] was engaged in or planning a fraud at the time the privileged communication was
7 made, and (2) the communication was made in furtherance of that activity.” *Barry v.*
8 *U.S.A.A.*, 989 P.2d 1172, 1176 (Wash. Ct. App. 1999).

9 However, *Cedell* and its progeny are inapplicable when an insurer withholds
10 documents under the work product doctrine in federal court. *MKB Constructors v. Am.*
11 *Zurich Ins. Co.*, No. C13-0611JLR, 2014 WL 2526901, at *8 (W.D. Wash. May 27,
12 2014). The primary purpose of the work product rule is to “prevent exploitation of a
13 party’s efforts in preparing for litigation.” *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d
14 1486, 1494 (9th Cir. 1989). To qualify as protected work product, the document must be
15 prepared in anticipation of litigation or for trial. *Holmgren v. State Farm Mut. Auto. Ins.*
16 *Co.*, 976 F.2d 573, 576 (9th Cir. 1992).

17 Accordingly, based on the foregoing legal standards, the parties’ submissions, and
18 the court’s *in camera* review, the court ORDERS AFM to produce the following
19 documents with the indicated alterations:

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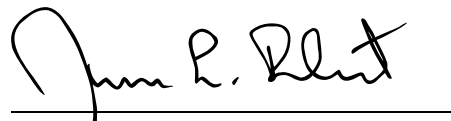
22 //

Document Privilege Log ID	Alteration(s)
003_00007	Produce and leave unredacted legal service charge on 6/21/19 starting with "For FM Global Matter . . ." Remaining charges may be redacted.
006_00012	Produce and leave unredacted legal service charge on 11/8/19. Remaining charges may be redacted.
010_00020	Remove all redactions
020_00030	Produce the entire document
021_00031	Produce the entire document
025_00037	Produce and leave unredacted the two charges on 6/21/19; the charge on 7/15/19 re. the call with client's adjuster; and the 8/26/19 charge re. claim investigation. Remaining charges may be redacted.
029_00043	Produce and leave unredacted the charge on 8/16/19 by K. Librera; the portion of the charge on 8/19/19 by K. Librera at "call with client . . . D. Bentson regarding claims letter"; the 8/23/19 charge by K. Librera; and the 8/27/19 charge. Remaining charges may be redacted.
035_00052	Produce and leave unredacted the charges on 9/10/19 "Review and Analyze draft letter . . ."; 9/11/19 "Review and analyze . . ."; and 9/25/19 "Telephone calls from and to . . ." Remaining charges may be redacted.
041_00061	Produce and leave unredacted the charge on 9/9/19 by H. Kurzweil from "analysis of further letter from Ashbaugh . . ."; 9/10/19 by H. Kurzweil at "Miscellaneous problems . . . Comments relating to same"; and 9/19/19 by H. Kurzweil. Remaining charges may be redacted.
047_00070	Produce and leave unredacted the charge on 10/16/19 from "work on strategy . . ." Remaining charges may be redacted.
049_00073	Produce and leave unredacted the charges on 10/1/19 by K. Librera re. "call regarding inspection"; 10/2/19 by H. Kurzweil at "Conference call with . . . Relevant to inspection"; and 10/2/19 by K. Librera at "updates regarding investigation and site inspection." Remaining charges may be redacted.
057_00085	Produce and leave unredacted the charges on 1/6/20 by H. Kurzweil from "Attention to follow up . . ."; 1/8/20 by H. Kurzweil from "Telephone conference . . ."; 01/23/20 by H. Kurzweil at "attention to . . . claim notice"; 1/24/20 by H. Kurzweil at "Work on response to . . . additional information"; 1/27/20 by H. Kurzweil from "Update on response . . ."; and 1/29/20 by H. Kurzweil at "further attention to . . . of same." Remaining charges may be redacted.

Document Privilege Log ID	Alteration(s)
079_00122	Produce the entire document
081_00124	Produce the entire document
083_00128	Produce the entire document
088_00133	Produce the entire document
093_00140	Produce the entire document
102_00149	Produce the entire document
106_00153	Remove redactions from the paragraph beginning with "We are puzzled . . ." The remainder of the redactions can remain.
112_00160	Remove all redactions
114_00162	Produce the entire document
115_00163	Produce the entire document
116_00164	Produce the entire document
117_00165	Produce and redact sentence beginning with "Our recommendation . . ."
122_00170	Produce the entire document
149_00205	Produce the entire document
150_00206	Produce the entire document
151_00207	Produce the entire document
152_00208	Produce the entire document
153_00209	Produce the entire document
154_00210	Produce the entire document
155_00211	Produce the entire document
156_00212	Produce the entire document
157_00213	Produce the entire document
158_00214	Produce the entire document
159_00215	Produce the entire document
160_00216	Produce the entire document
161_00217	Remove all redactions

AFM shall produce these documents within seven days of the filing date of this order.

Dated this 2nd day of February, 2021.


 JAMES L. ROBART
 United States District Judge